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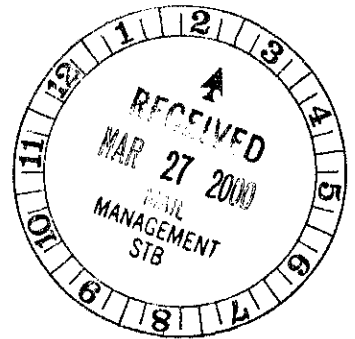
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS



**REPLY OF NORFOLK SOUTHERN TO CN'S
PETITION FOR STAY PENDING JUDICIAL REVIEW**

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DATED: March 27, 2000

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**REPLY OF NORFOLK SOUTHERN TO CN'S
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Pursuant to 49 C.F.R. § 1115.5, Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS") hereby reply to the petition ("Pet.") of Canadian National Railway Company ("CN") for a stay, pending judicial review, of the Board's decision served March 17, 2000 ("Decision"). CN's request for a stay should be denied substantially for the reasons set forth in NS's separate reply to BNSF's petition for a stay. Rather than repeat those reasons, NS will confine its discussion here to several points raised by CN's petition.

1. **The Scope of the Board's Decision.** Like BNSF before it, CN argues that the Decision constitutes a flagrant violation of First Amendment rights insofar as it directs railroads to "suspend activity relating to any" major rail consolidation transaction (Decision at 10). Pet. at 1, 7. This argument is a red herring, and the Board should act to remove it from this case.

It was surely not the Board's intention to prohibit CN (or BNSF) from taking action to perfect its legal challenge to the Decision or to engage in speech criticizing, and seeking by lawful means to overturn, the Board's suspension order. Nor, clearly, was it the Board's intention to prohibit protected speech about actual or planned rail consolidation transactions, including speech about the subjects described in the bullet points on page 7 of CN's petition. In short, it is sheer hyperbole to suggest that the Board has "unconstitutionally bound and gagged railroad management." Pet. at 1. To the contrary, NS understands the Decision to mean that the Board was simply suspending its *own* adjudicatory consideration of major rail consolidation proposals. To the extent the Board intended to prohibit any private conduct by the railroads, it was seeking only

to prevent carriers from attempting to invoke the Board's processes and prosecute a major rail consolidation application before the agency.

Although CN's First Amendment claims are frivolous, the Board may wish to clarify its intent. The Board could, for example, clarify that its Decision was not intended to, and does not, restrain or prohibit *any* private activity, and that the Board's intent was simply to suspend administrative consideration and processing of major rail consolidation proposals during the 15-month suspension period. Such a clarification would not, in NS's judgment, undermine the important remedial purposes or the efficacy of the Board's suspension order, and it would also have the beneficial effect of eliminating unnecessary and distracting First Amendment (and injunction) issues from this case.

CN also contends that the Decision is "overbroad" because it forestalls the filing of a BNSF/CN application rather than being directed at NS and the other railroads which have suffered service problems in the wake of their own consolidations. CN Pet. at 5-6. This argument proves both too much and too little: too much because it effectively concedes (as it must) that there do indeed exist significant bases for concern about the current levels of rail service throughout North America, concern which would only be exacerbated by yet another consolidation transaction; and too little because it completely ignores the interrelated nature of the rail network and the implications of service failures in one portion of that network on service levels in other portions of the network. In fact, the Board heard testimony from a number of witnesses, including the CEO of Canadian Pacific, a carrier that has not been involved in any recent merger transactions, about the ripple effects of merger-related service disruptions caused by the consolidation of others. Moreover, the Board's Decision reflects its clear understanding of the dependent and interrelated nature of rail operations, a reality with which the Board has had to grapple in the Western rail service crisis that followed UP's acquisition of SP and in the Eastern rail service problems that have ensued in the wake of the NS-CSX division of Conrail. *See* Decision at 9 (discussing the Board's concern about the "disruption that [the BNSF/CN transac-

tion] would produce *throughout the industry*” and observing that “our action here addresses *industrywide concerns that involve all railroads (including BNSF and CN) . . .*” (emphasis added). Far from being “overbroad,” the Board’s Decision appropriately recognizes the industry-wide nature of the service disruptions and problems that additional mergers would be likely to create and accordingly seeks to treat with new rules for such transactions that will have industry-wide application.

2. **Statutory Authority For the Board’s Decision.** Like BNSF, CN argues that there is no statutory authority for the Board’s suspension order, and similarly expends considerable effort to establish the proposition that the national rail transportation policy and 49 U.S.C. § 721 are ancillary to the Board’s express statutory powers and are not themselves an independent source of authority to act. CN Pet. at 2-4. While this may be true, it is also irrelevant. CN boldly charges that “the Board has cited *no* explicit statutory power that it is ‘carrying out’ . . .” (*id.*) (emphasis added) but, like BNSF, it overlooks (or attempts to obscure) the obvious: that the Board squarely invoked its express statutory authority under 49 U.S.C. § 11324(c) to review rail consolidations for consistency with the “public interest.”

As NS explains in its separate reply to BNSF’s stay petition, the broad public-interest mandate under Section 11324(c) authorizes the Board, in conjunction with its “ancillary” rulemaking authority under Section 721, to adopt rules to implement, enforce and protect the public interest as it relates to rail consolidation transactions, including the adoption of a temporary suspension of the processing and consideration of major rail consolidation proposals while the agency develops new standards and procedures for judging such transactions. *See* NS Reply to BNSF Pet. at 3-5.¹ To be sure, CN does not agree with the Board’s assessment of the public

¹ CN acknowledges that 49 U.S.C. § 721(b)(4) authorizes the Board, upon proper findings of irreparable harm, to adopt rules without observance of the notice-and-comment procedural requirements of the Administrative Procedures Act. CN Pet. at 4. The Board made such an irreparable harm finding. Decision at 10. CN’s admission thus refutes BNSF’s claim that the Board’s Decision violates notice-and-comment procedures. BNSF Pet. at 6-7. In any event, the Board’s suspension order is exempt from the notice-and-comment requirements because it

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interest and, more particularly, with the Board's finding that it would not be in the public interest to process or consider *any* major rail consolidation proposal at this time. But CN cannot escape the fact that the Board *did* invoke its authority under the public-interest standard. That authority delegates broad power to the agency to determine and enforce its conception of the public interest.²

CN's challenge to the lawfulness of the Board's suspension order ultimately rests not on its arguments about the "ancillary" nature of the remedial provisions cited by the Board but instead on the assertion that the Board's suspension order violates the procedural timetable set forth in 49 U.S.C. § 11325. NS has already explained why this argument is without merit. *See* NS Reply to BNSF Pet. at 7-8. NS would only add that CN does not explain how it can be that the procedural schedule set forth in Section 11325 utterly divests the Board of its express authority to adopt and apply rules implementing the public-interest standard and to proceed by rulemaking rather than case-by-case adjudication.³ CN does not explain how it can be that the

¹(...continued)
constitutes a valid "rule[]" of agency organization, procedure, or practice" under 5 U.S.C. § 553(b)(A). *See* NS Reply to BNSF Pet. at 6-7.

² Predictably, CN quotes (Pet. at 2) from the U.S. Supreme Court's decision last week holding that the FDA has no authority to regulate tobacco as a "safe" and "effective" drug, but that decision is plainly inapposite. *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152 (Mar. 21, 2000). In that case, there was no express statutory grant of authority to the FDA to regulate tobacco. After reviewing the entirety of the FDA's statutory authority, the separate "regulatory scheme" Congress created in several statutes giving other federal agencies authority to regulate tobacco, and the failure of Congress on several occasions to enact legislation granting the FDA authority to regulate tobacco products, the Court concluded that the statute at issue could not be interpreted to confer such authority. Here, by contrast, Congress expressly conferred on the Board plenary and exclusive jurisdiction to regulate rail consolidation proposals in accordance with the public interest. The Board's decision temporarily to suspend processing and consideration of major rail consolidation proposals thus falls squarely within the scope of the Board's express statutory authority.

³ Under the legal theory now advanced by CN (and BNSF) -- that the Board has an absolute statutory duty to process and decide *any* rail consolidation application within 16 months of its filing -- the Board's *existing* rules would clearly be unlawful. Those rules require that applicants in major rail consolidation proceedings file a notice of intent at least 90 days before the filing of a control application. 49 C.F.R. § 1180.4(b). No one, least of all CN and BNSF, has ever suggested that this rule is invalid. If the Board has authority to require that major rail consolida-
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Board is somehow *required* to accept as complete, and then spend a year or more considering the merits of, a BNSF/CN control application when it is in the process of developing the very standards under which that application can and must be judged. And CN does not explain how it can be that the Board, having already found on the basis of substantial evidence that *no* major rail consolidation could be found consistent with the public interest until new merger rules are adopted, would be barred from rejecting a BNSF/CN control application on the ground that it is incomplete or fails to establish a *prima facie* case for approval. In practical terms, all that the Board has done in its Decision is to eliminate the useless (and, to the industry, harmful) formality of receiving and considering a control application that cannot possibly be approved and whose very pendency would cause grave harm to the rail industry and the shipping public. Like the dog that did not bark, CN's silence in the face of these issues is telling.

3. **Irreparable Injury.** CN argues, at it must, that it will suffer irreparable injury if the Board's suspension order is not stayed. Pet. at 7-8. But, rather than arguing (as BNSF did) that it would suffer monetary harm and loss of merger benefits from a delay in the consummation of the proposed BNSF/CN consolidation, CN advances the breathtaking claim that *any* delay in its efforts to combine with BNSF would constitute irreparable injury as a matter of law. Of course, that is not, and cannot be, the law. The court decisions CN cites in support of this claim are not on point.⁴ All involved requests for injunctions restraining a hostile corporate takeover attempt. In each case, the court found that an injunction restraining the hostile tender offer would

³(...continued)
tion applicants wait at least three months from the filing of a notice of intent before filing a rail consolidation application, surely the Board has authority by rule to impose a 15-month waiting period for reasons far more exigent than the docket-management purposes underlying the existing waiting period.

⁴ See *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 553 (3d Cir. 1999); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988); *San Francisco Real Estate Investors v. Real Estate Investment Trust*, 701 F.2d 1000 (1st Cir. 1983); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980).

effectively defeat the transaction, and upset the balance between hostile acquirer and target (or competing bidder) that Congress had deliberately left to resolution by private market forces.

By contrast, the proposed BNSF/CN consolidation is not a transaction that Congress left for the private market to judge. It is subject to public-interest review by the Board under a broad statutory mandate and a lengthy and indeterminate process. CN and BNSF, in short, have no legal right to, and no legitimate expectation of, a transaction unimpeded by delay and certain in outcome.

Moreover, it cannot be said in this case, as it was in the cases cited by CN, that denial of the requested stay would effectively defeat the proposed BNSF/CN transaction. Not even CN suggests that it will not go through with the combination if the Board's consideration is postponed for 15 months. In fact, the BNSF/CN combination agreement expressly contemplates the possibility of lengthy regulatory delay, and provides that neither party may terminate the transaction until December 31, 2002 (Combination Agreement §§ 5.13, 9.1(ii)) -- a very lengthy period that would permit the Board to complete its proposed rulemaking as contemplated within 15 months, and then entertain and decide a BNSF/CN control application. It is difficult for CN to claim that it will be irreparably harmed by a statutory review process that produces a final decision within the period of time to which CN and BNSF have bound themselves by contract.

As NS has demonstrated, the purported benefits of the proposed BNSF/CN transaction that will allegedly be lost in the absence of a stay are merely speculative and uncertain economic benefits whose realization depends on a variety of assumptions and predictions of dubious validity. NS Reply to BNSF Pet. at 8-9. To cite but one example, the benefits CN predicts are necessarily predicated on the Board (not to mention BNSF and CN shareholders) approving the consolidation as proposed. It is by no means certain that the Board will ultimately approve the proposed consolidation, and unlikely that the Board will approve it as proposed without significant conditions and revisions. Moreover, it is unlikely that the Board's suspension order would delay consummation of the BNSF/CN transaction (even if approved) in view of the Board's

statement that it is likely that the BNSF/CN consolidation proceeding, even if started now, would have to begin over again following the Board's adoption of new merger rules. Decision at 7. For the same reason, granting a stay of the Decision would not prevent the delay that CN claims is the source of its injury. In short, the benefits CN claims it will lose in the absence of a stay are too speculative to constitute the requisite immediate threat of irreparable injury that is "both certain and great" and "actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

4. Simultaneous Rulemaking and Individual Application Proceedings. CN argues that the Board erred when it decided to develop new consolidation rules to reflect changes in the railroad industry *before* proceeding to consider individual major rail consolidation proposals. CN contends that the Board must either (i) proceed on parallel tracks -- conducting a rulemaking to promulgate new consolidation rules while simultaneously processing individual applications under the old rules -- or (ii) develop its new rules through an adjudicatory proceeding concerning the proposed BNSF/CN transaction.⁵ Neither course of action is required by law or logic, and the course the Board has set is more consistent with its findings regarding the public interest and wise use of public resources.

The Board has broad discretion to structure its procedures in the manner it determines, in its expert judgment, to be best suited to achieve its statutory responsibilities. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). CN's contention that the Board

⁵ In arguing that the Board could adopt new standards in the context of an adjudication of the proposed CN/BNSF transaction and apply them to that transaction, CN effectively refutes BNSF's argument that the Board must apply the old, existing rules to that transaction. *Compare* CN Stay Pet. at 1, 5-6 with BNSF Stay Pet. at 6-7. The testimony of the CN Chairman Paul Tellier similarly confirms that, contrary to BNSF's claims that such application of revised procedures and standards to its proposal is unlawful retroactive rulemaking, such a procedure is both lawful and appropriate. *See, e.g.,* March 7, 2000 Hearing Tr. 137 (Tellier Testimony) (telling STB, "you raise the bar and . . . tell us what standards that you expect us to meet. As [CN] ha[s] said in [its] written statement, if you are going to apply new standards for [CN's] transaction, fine with us, and we will ensure that we meet these standards."). *See also* Post-Hearing Comments of CP, CSX, Norfolk Southern and Union Pacific (filed Mar. 15, 2000), at 16-17 (addressing suggestion that Decision constitutes unlawful retroactive rulemaking).

should simultaneously consider both its proposed transaction and develop new rules to govern the Board's consideration of such proposals flatly ignores the Board's finding, supported by substantial evidence, that processing major rail consolidation applications at this point in time would be detrimental to the public interest, disrupt the industry, and produce irreparable harm to both. Decision at 8-9.

CONCLUSION

For all of the foregoing reasons, the Board should deny CN's petition for a stay.

Respectfully submitted,



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DATED: March 27, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of March, 2000, I served the foregoing "Reply of Norfolk Southern to CN's Petition for Stay Pending Judicial Review" by causing a copy thereof to be sent in the manner indicated below to each of the following:

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